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No.

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In The

Supreme Court of the United States

October Term, 1984

JOHN CERASANI,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTION PRESENTED

Can a prosecutor who subjects a defendant after one acquittal to a second prosecution under the Racketeering Influenced and Corrupt Organizations Act for participation in the same enterprise during the same time period avoid violating the constitutional proscription against double jeopardy by simply changing some of the named defendants and the specific acts of racketeering alleged in the second indictment?

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To the Honorable, the Chief Justice of the United States and the Associate Justices of the United States Supreme Court:

Petitioner John Cerasani respectfully prays that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the Eleventh Circuit which affirmed an order by the United States District Court for the Middle District of Florida denying petitioner's motion to dismiss the indictment in this case on grounds of double jeopardy.

OPINIONS BELOW

The opinion of the Court of Appeals is not officially reported; a copy is annexed as Appendix A. The opinion of the District Court in this case is not officially reported; a copy of that opinion is annexed as Appendix B.

JURISDICTION

The judgment of the Court of Appeals was entered on March 5, 1985; a copy of the judgment is annexed as Appendix C. The Court's jurisdiction is invoked pursuant to Title 28, United States Code, § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment V of the United States Constitution and 18 U.S.C. § 1962(c) are involved in this case (*see* Appendix D).

STATEMENT OF THE CASE

In 1981, the government indicted petitioner Cerasani in the United States District Court for the Southern District of New York for conspiracy to violate 18 U.S.C. § 1962, the Racketeer Influenced and Corrupt Organizations Act (Count I) and substantive violation of that Act (Count II). In support of these charges, the indictment alleged that between 1974 and 1981, petitioner had participated in an enterprise called La Cosa Nostra through a pattern of racketeering activity which took place throughout the United States including specifically New York and Florida. After trial by jury, petitioner was acquitted of both of these RICO charges on August 27, 1982.

In 1983, the government indicted petitioner in the present case in the United States District Court for the Middle District of Florida, Tampa Division, and again charged him with RICO conspiracy (Count I), and substantive RICO violation (Count II).

In support of these charges, this indictment again alleged that between 1979 and 1981, petitioner had participated in an enterprise called La Cosa Nostra through a pattern of racketeering activity which took place throughout the United States and specifically in New York and Florida. Prior to trial, petitioner moved pursuant to Rule 12(b) of the Federal Rules of Criminal Procedure and the Fifth Amendment of the United States Constitution for an order dismissing these charges on the ground that prosecution of them would violate the Double Jeopardy Clause of the Fifth Amendment. On December 5, 1983, the District Court denied this motion in a written order (Appendix B, hereto). On March 5, 1985, the Eleventh Circuit affirmed that order (Appendix A).

A. The New York Proceedings

On November 23, 1981, petitioner Cerasani and various other defendants were indicted in the United States District Court for the Southern District of New York (Indictment #81 Cr. 803), charged *inter alia* with RICO conspiracy and substantive RICO violation. A superseding indictment was filed on March 25, 1982 and a second superseding indictment, the one on which petitioner was tried, was filed on July 7, 1982. This last indictment charged that between 1974 and the filing of the indictment, petitioner Cerasani, co-petitioner Ruggiero, other named defendants and "others known and unknown to the grand jury" were associated in an enterprise called La Cosa Nostra, which was engaged in activities which affected interstate commerce through a pattern of racketeering (N.Y. Ind. at 1, 2, 7-8). The indictment further alleged that this enterprise "operated throughout the United States" (N.Y. Ind. at 1), including specifically Florida (N.Y. Ind. 5), New York (*see, e.g.*, N.Y. Ind. at 3), and "elsewhere" (*see, e.g.*, N.Y. Ind. at 4). The pattern of racketeering was alleged to include acts of murder, robbery, drug crimes, theft from interstate shipment, illegal gambling and interstate transportation of stolen property (N.Y. Ind. at 1-2, 3-7, 8-10). One of the specific examples of these crimes cited in the indictment was "the conspiracy to rob the Landmark Union Trust Bank . . . 9th Street and Central Avenue, St. Petersburg, Florida" between November 23 and November 25, 1980 (N.Y. Ind. at 5).

Trial in the New York case commenced on July 26, 1982. The government, both in its arguments to the jury and the evidence it presented, tried the case on the theory that the enterprise with which the defendants were allegedly associated was a nationwide criminal organization which conducted its activities in New York, Florida and various other locations. The government also clearly sought to convince the jury that petitioner Cerasani was actively involved in the operations of this enterprise in both New York and Florida.

Thus, in its opening statement, the government described the broad scope of the crimes with which the defendants was charged.

> The bread and butter for these defendants came from truck hijackings, armed robbery, narcotics trafficking and gambling operations. When taken together with the acts of murder charged in this case, *they constituted a pattern of racketeering, a pattern which was committed between 1974 and 1981, in New York, New Jersey and Florida. This pattern of racketeering forms the basis for the charges in this indictment.*" (T23)[1] (emphasis added).

The prosecutor also alleged that petitioner Cerasani was the connection between the Bonanno Family of La Cosa Nostra and one Dennis Mulligan who was identified in the indictment as one of the enterprise members who had specifically conspired to commit the St. Petersburg bank robbery (*compare* T25 *with* N.Y. Ind. at 5).

In addition, the prosecutors in the New York case alleged that the New York and Florida activities of this enterprise were inextricably intertwined. Thus, the prosecutor alluded in his opening statement to the connection between the New York activities and the Florida activities which would be revealed in

1. All "T" references herein are to excerpts from the transcripts of New York trial, which are part of the record on appeal.

the anticipated testimony of two FBI undercover agents, aliases "Donnie Brasco" and "Tony Rossi":

> Over the years, Brasco enhanced his credibility with [co-appellant] Ruggiero and with Dominick Napolitano and other members of his crew. Brasco became such a trusted member of his crew that in 1980 Napolitano and Ruggiero promised that they would propose Brasco for membership in the Bonanno Family itself. Most of Brasco's undercover work during 1980 and 1981 occurred in Tampa, Florida, where he posed as the friend of the owner of a bar, the Bottle Club, as it was known.
>
> Beginning in March 1980, the defendant Ruggiero began to visit Brasco in Florida. Later on, Ruggiero brought his captain Napolitano down to see Brasco in Florida. For the next fourteen months, Ruggiero and Napolitano demanded and later received money from the owner of that bar. The owner of that bar was a man named Tony Rossi. What neither the defendants nor Napolitano knew, however, was that Rossi himself was an undercover agent of the F.B.I. and that bar or Bottle Club was operating as an undercover operation of the F.B.I. *In exchange for the money which the defendant Ruggiero and co-conspirator Napolitano received, they provided influence or contacts for Brasco and the other undercover agent in Florida, contacts which you will learn included their connection with a man named Santo Trafficante.*
>
> *Santo Trafficante was the boss of La Cosa Nostra in the State of Florida.* In his undercover role, Donnie Brasco pretended to operate a loansharking business as well as a gambling business. And he returned what Napolitano and

> Ruggiero thought were profits from these illegal enterprises.
>
> In reality, Brasco was simply paying the money which was being furnished by the F.B.I. Brasco also hosted frequent visits by Ruggiero and Napolitano to Florida, and acted out the role of the loyal soldier eager to move up in the family." (T31-33).

Finally, the New York prosecutor concluded by referring the jury to the fact that the enterprise alleged in the indictment was actively involved in Florida during the operative period of the enterprise:

> You will also learn about a number of criminal acts which occurred between 1974 and 1980, in Florida, New York and New Jersey. Different times and different places will be involved. (T36).

The evidence adduced at the New York trial similarly documented the alleged involvement of that enterprise and specifically petitioner Cerasani in the activities which took place in Florida. Thus, FBI Special Agent Joseph Pistone alias "Donnie Brasco" — testified at the New York trial that the criminal activities of the enterprise extended to Florida as well as New York and detailed the involvement of various of the New York defendants — among them Cerasani — in criminal activities in Florida.

On August 27, 1982, petitioner Cerasani was acquitted after trial by jury of both of the RICO charges.

B. The Florida Proceedings

Seven months later, petitioner Cerasani was indicted in the present case and again charged with RICO conspiracy and substantive RICO violation. Once again, the indictment alleged that Cerasani, co-petitioner Ruggiero, various named defendants and "others known and unknown" were associated in an enterprise

called La Cosa Nostra which was engaged in a pattern of racketeering activity. This indictment focused on the period between March 1, 1979 and November 18, 1981. Once again, it was alleged that the enterprise operated throughout the United States including specifically New York and Florida. The pattern of racketeering was alleged to include acts of robbery, drug crimes, illegal gambling, extortion, bribery and interference with commerce. Again, one of the specific examples of these crimes cited in the indictment was the conspiracy to rob the Landmark Union Trust Bank on November 25, 1980.

Numerous of the overt acts and predicate crimes listed in the Florida indictment likewise concerned events which had been attested to as part of the pattern of racketeering described in the New York trial. *See, e.g.,* Fla. Ind. overt acts 3, 9, 17, 18, 19, 20, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 36, 38, 46, 50, 53; *see also,* predicate crimes A(iv), (v), (vi), (vii); B(i), E(i); and F.

Since he had already been acquitted of these charges, petitioner Cerasani moved to dismiss the Florida indictment on the ground that prosecution under that indictment would violate his rights under the Double Jeopardy Clause of the United States Constitution. The District Court denied that motion on December 5, 1983 in a written order which is set forth in its entirety in Appendix B. The Eleventh Circuit affirmed the District Court's order (Appendix A).

REASONS FOR GRANTING THE WRIT

I.

The decision of the Eleventh Circuit is in conflict with the decisions of this Court concerning the scope of the constitutional prohibition against subjecting an individual to double jeopardy; the Eleventh Circuit's holding as to the limited applicability of the Double Jeopardy Clause to prosecutions under the Racketeering Influenced and Corrupt Organizations Act is erroneous.

The Racketeering Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961, *et seq.*, makes it a crime for anyone "associated with an enterprise" to "participate, directly or indirectly in the conduct of such enterprise's affairs through a pattern of racketeering activity..." § 1962(c).

The present prosecution constitutes the second time in as many years that petitioner Cerasani has been charged with conspiracy and substantive violation of the Racketeer Influenced and Corrupt Organizations Act. After trial by jury in the first prosecution, he was acquitted of both charges. Within months after that acquittal, the government filed the present indictment.

In the first proceeding, petitioner was obliged to defend himself against charges that he had been associated with La Cosa Nostra and had participated in the conduct of that enterprise's affairs through a pattern of racketeering which took place throughout the United States, including New York and Florida, between 1974 and 1982.

The second indictment likewise alleges that petitioner is associated with La Cosa Nostra and that he participated in the conduct of that enterprise's affairs through a pattern of racketeering. This time, the indictment focuses on the period between March 1, 1979 and November 18, 1981, a limited portion of the time period covered by the first indictment, and concerns primarily activities in Florida, although events in New York and elsewhere are also mentioned.

Numerous of the named defendants, co-conspirators, overt acts and predicate crimes are the same or similar in both indictments. Many more of the defendants, overt acts and predicate crimes listed in the second indictment were attested to at length by the government's witnesses at the first trial. Moreover, since all of the defendants in both indictments were alleged to be members of La Cosa Nostra and since all of the overt acts and predicate crimes alleged in the second indictment were supposedly committed in furtherance of that enterprise's affairs, all of those

acts and crimes could have been alleged and/or proven at petitioner's first trial.

For the government to thus divide up a conspiracy or enterprise into "discrete theories of liability" *Sanabria v. United States,* 437 U.S. 54, 64-65 (1978) and then prosecute each theory successively in the hopes of eventually securing a conviction against petitioner constitutes a direct violation of the Double Jeopardy Clause, particularly where, as here, there is substantial overlap in the facts being alleged in support of the successive charges. *United States v. Marable,* 578 F. 2d 151, 153 (5th Cir. 1978); *see also, Braverman v. United States*, 317 U.S. 49 (1942).

Petitioner Cerasani has already successfully defended himself against the charge that he participated in La Cosa Nostra through a pattern of racketeering between 1976 and 1982. Any evidence which the government had concerning those charges was, or should have been, presented to the jury in that case. Having been acquitted of those charges once, he cannot properly be subjected to them yet another time for participation in the same enterprise during the same period of time. He therefore respectfully requests that the charges against him be dismissed.

The Double Jeopardy Clause of the Fifth Amendment provides that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb." Its most common and widely recognized purpose is to protect an individual "against second prosecution for the same offense after acquittal." *North Carolina v. Pearce,* 395 U.S. 711, 717 (1969). In such circumstances, the guarantee serves "a constitutional policy of finality for the defendant's benefit." *United States v. Jorn,* 400 U.S. 470, 479 (1971), a policy which "protects the accused from attempts to relitigate the facts underlying a prior acquittal." *Brown v. Ohio*, 432 U.S. 161, 165 (1977); *Ashe v. Swenson*, 397 U.S. 436 (1970). As Chief Justice Berger stated for this Court in *Breed v. Jones*, 421 U.S. 519, 529-530 (1975):

> Because of its purpose and potential consequences, and the nature and resources of the

> State, [a criminal] proceeding imposes heavy pressures and burdens — psychological, physical, and financial — on a person charged. The purpose of the Double Jeopardy Clause is to require that he be subject to the experience only once "for the same offense."

Application of this protection to prosecution of crimes with particularized elements, such as murder or robbery, is fairly simple, particularly where the second prosecution charges the same statutory offense. In such circumstances, re-prosecution based on the same event or underlying transaction is clearly prohibited. *See e.g. United States v. Martin Linen Co.*, 430 U.S. 564, 571 (1977); *United States v. Ball*, 163 U.S. 662, 671 (1896).

The application of the Double Jeopardy Clause becomes more elusive, however, when the successive prosecutions involve charges such as conspiracy or RICO, the elements of which are more generalized and consequently, subject to proof by a variety of different "theor[ies] of liability" *Sanabria v. United States*, 437 U.S. 54, 64-65, 72 (1978) or combinations of proof. *United States v. Mallah*, 503 F. 2d 971, 985 (2d Cir. 1974).

Petitioner submits that in the present case, the charges in the two indictments are simply different "theories of liability" for the same offense and that the second indictment is therefore barred by the Double Jeopardy Clause. Here, as in the previous prosecution, petitioner is charged with RICO conspiracy and substantive RICO violation. Here, as in the previous prosecution, those charges are based on the allegation that he was associated with an enterprise called La Cosa Nostra and that he participated in the conduct of that enterprise's affairs through a pattern of racketeering activity. Moreover, here, the time period charged — March 1, 1979 to November 18, 1981 — is totally encompassed in the time period alleged in the first indictment — 1974-1982.

These factors alone are sufficient to establish that the present prosecution is subjecting petitioner Cerasani to impermissible double jeopardy. It has long been universally recognized that

> If the government sees fit to send an indictment. . .charging a continuing conspiracy for a period of time, it must do so with the understanding that upon conviction or acquittal further prosecution of that conspiracy during the period charged is barred. *Short v. United States,* 91 F.2d 614, 624 (4th Cir. 1937).

Cited with approval in *United States v. Mallah, supra,* 503 F. 2d at 985; *see also, Sanabria v. United States, supra,* 437 U.S. at 71-72.

The lower courts have nevertheless denied petitioner's motion to dismiss the present charges. While conceding that the statutory offenses with which petitioner is charged in the present proceeding are identical to the statutory offenses with which he was charged in the previous prosecution and that the time period alleged here was totally covered by the previous prosecution, the lower courts nevertheless held that the government could avoid the prohibition of the Double Jeopardy Clause merely by changing most of the named defendants and overt acts in the second prosecution.

That holding violates both the plain wording and the clear intent of the Double Jeopardy Clause. As this Court recently held:

> The Double Jeopardy Clause is not such a fragile guarantee that. . .its limitations can be avoided by the simple expedient of dividing a single crime into a series of temporal or spatial units. . .or. . .into "discrete bases of liability" not defined as such by the legislature.

Sanabria v. United States, supra, 437 U.S. at 72, *quoting Brown v. Ohio, supra,* 432 U.S. at 169. Yet, that is precisely what the government is attempting to do in the present proceeding.

In approving of the government's re-indictment of petitioner's Cerasani in this case, the lower courts in effect held that an individual could properly be subjected to a potentially unlimited

number of successive RICO prosecutions for the same statutory offenses, involving the same over-all enterprise during the same time period, as long as the specifically named defendants and specific overt acts alleged in each indictment were not entirely identical. Such an interpretation would effectively nullify the Double Jeopardy Clause of the Federal Constitution, at least in RICO prosecutions, and would permit the government to harass an individual defendant with an endless succession of such prosecutions merely by varying the named defendants or the specific racketeering offenses cited.

It is well established that successive charges "need not be identical - either in constituent elements or in actual proof - in order to be the same within the meaning of the constitutional prohibition [of the Double Jeopardy Clause]." *Brown v. Ohio*, 432 U.S. 161, 164 (1977). Rather, at least where the second prosecution is for the same statutory offenses, as it is in this case, the controlling question is whether the second prosecution falls within the same "allowable unit of prosecution" as the first. If so, then the second prosecution constitutes double jeopardy and is constitutionally impermissible. As this Court has explained:

> . . .once Congress has defined a statutory offense by its prescription of the "allowable unit of prosecution" [citations omitted], that prescription determines the scope of protection afforded by a prior conviction or acquittal. Whether a particular course of conduct involves one or more distinct "offenses" under the statute depends on this congressional choice.

The plain wording of § 1962(c) establishes that the allowable unit of prosecution under that section is participating "directly or indirectly in the conduct of [an] enterprise's affairs through a pattern of racketeering activity. . ." The lower courts, relying on dicta in the Second Circuit's decision in *United States v. Russotti*, 717 F. 2d 27 (2d Cir. 1983), held that "in order for the present indictment to give rise to a valid claim of double jeopardy, *both* the enterprise and the pattern of activity alleged

in the [first indictment] must be the same as those alleged in the [second indictment]. If either is different, there is no infirmity under the double jeopardy clause."

That assertion was mere dicta in *Russotti*, however, since in that case, unlike here, the pattern of racketeering activity alleged in the second indictment involved a totally different time period than the pattern of racketeering activity alleged in the first indictment. As the court explained in that case:

> . . .there is no time overlap as to the predicate offenses alleged in the 1976 indictment having occurred on March 17, 1973, and the first predicate offense alleged in the 1982 indictment - the Massaro homicide - having occurred in October of 1973.

Id., at 33. Thus, *Russotti* merely stands for the unremarkable proposition that one RICO prosecution does not "immunize members of that enterprise from any future prosecution" based on "subsequent misconduct" (*Id.*, at 34).[2] That is not the case here, however, since, as the lower courts themselves found, the pattern of racketeering activity alleged in the second indictment took place entirely within the period of the pattern of racketeering activity alleged in the first indictment.

More importantly, to the extent that this *dicta* from *Russotti* is interpreted to say that the government can evade double jeopardy protections in RICO prosecutions merely by making sure that the specific racketeering acts in the second prosecution are not "identical" to those which were listed in the first prosecution, it is contrary to controlling Supreme Court precedent, as well as the plain wording of the statute and the intent of Congress

2. The same is true of *United States v. Dean*, 647 F.2d 779 (8th Cir. 1981), *modified*, 667 F.2d 729 (1981), *cert. denied*, 456 U.S. 1006 (1982), on which the Court relied in *Russotti*. *See United States v. Dean, supra*, 647 F.2d at 788 (". . . the two RICO counts . . . involved activity taking place during different time periods. Under one count, unlawful acts allegedly occurred between January, 1974, and May, 1977; under the other count, between October, 1977, and July, 1978.")

in enacting it. These authorities clearly establish that an individual's participation in the conduct of an enterprise's affairs through the commission of a pattern of racketeering during a particular period is a single offense under RICO, no matter which or how many crimes make up that pattern.

In this regard, the decision of the Eleventh Circuit in this case is in direct conflict with this Court's decision in *Sanabria v. United States, supra.* There, the defendant had been charged with violation of 18 U.S.C. § 1955, which makes it a federal offense for five or more persons to conduct an "illegal gambling business" in violation of the laws of the place where the business is located. The defendant was acquitted after a trial which was limited to evidence of horse race betting. The government then insisted that it should be permitted to prosecute the defendant a second time for the same statutory offense on the theory that his gambling business had also engaged in illegal numbers betting. This Court rejected that argument, stating that the federal gambling statute could not be divided into such "discrete bases of liability". *Id.*, 437 U.S. at 72. Rather, the Court held that the "allowable unit of prosecution" under § 1955 was participation in a gambling business which was conducted in violation of state law, regardless of how many state statutes that enterprise violated. In reaching that conclusion, the Court found it significant that in enacting the statute in question

> Congress did not assimilate state gambling laws per se into the federal penal code, nor did it define discrete acts of gambling as independent federal offenses. . .The government need not prove that the defendant himself performed any act of gambling prohibited by state law. It is participation in the gambling business that is a federal offense, and it is only the gambling business that must violate state law. And, as the Government recognizes, under Section 1955 participation in a single gambling business is but a single offense, "no matter how many state statutes the enterprise violated. . ."

(*Id.*, 437 U.S. at 70-71).

The same, of course, is true of the "racketeering" crimes listed in § 1961(1). Although § 1961(1) provides a long list of state and federal crimes, Congress, as with the gambling statute, did not assimilate the state laws per se into the federal penal code, nor did it define discrete violations of those laws as independent federal offenses. The government need not prove that the defendant himself committed any particular one of the crimes listed, or even that he committed any individual crime, so long as he participated, at least indirectly in the conduct of the enterprise's affairs through the commission of a "pattern" of those offenses.

This Court also held in *Sanabria* that even if the government had alleged only one discrete theory of liablity in its first prosecution, it would still be barred from thereafter attempting to prosecute the defendant a second time for violation of the same statute during the same period under a different theory of liability:

> Had the Government charged only that the business was engaged in horse betting and had petitioner been acquitted, his acquittal would bar any further prosecution for participating in the same gambling business during the same time period on a numbers theory. . .the discrete violations of state law which that business may have committed are not severable in order to avoid the Double Jeopardy Clause's bar on retrials for the same offense.

Id., 437 U.S. at 71-72.

Similarly, successive prosecutions based on temporal or spatial differences or discrete theories in liability have been held to be barred in conspiracy cases. In *Braverman v. United States*, 317 U.S. 49 (1942), for example, the government claimed that the participants in a single conspiracy could be consecutively punished under the conspiracy statute for each of the different laws they

had conspired to violate. This Court soundly rejected this argument stating:

> Whether the object of a single agreement is to commit one or many crimes, it is in either case that agreement which constitutes the conspiracy which the statute punishes. The one agreement cannot be taken to be several agreements and hence several conspiracies because it envisages the violation of several statutes rather than one.

Id., 317 U.S. at 53. As this Court later said of that holding in *Sanabria v. United States, supra,* 437 U.S. at 74:

> The same reasoning must also apply where the essence of the crime created by Congress is participation in a "business," rather than participation in an "agreement."

It is therefore necessarily also applicable where, as here, the essence of the crime created by Congress is participation in an "enterprise."

The Fifth Circuit, applying *Braverman,* reversed a second conspiracy conviction in *United States v. Marable,* 578 F. 2d 151, 153 (5th Cir. 1978), noting:

> The majority of conspiracies will involve agreements to undertake a series of actions. To allow one or two of these acts to serve as the basis for several separate prosecutions would enable the construction of multiple conspiracy prosecutions from a single agreement contrary to the principle in *Braverman* that under a single conspiracy statute only one offense of conspiracy can occur from a single agreement.

Similarly, in *United States v. Mallah, supra,* the Second Circuit reversed the conviction of one appellant — Vincent Pacelli

— on double jeopardy grounds, despite the fact that the allegations in the indictment were considerably more disparate in several regards than the allegation in the present proceeding. In the first prosecution, Pacelli had been indicted and convicted for conspiracy to violate the federal narcotic laws between January and June, 1971. The subsequent indictment charged Pacelli with conspiracy to violate the federal narcotics laws between January 1971 and August 1973. All of the overt acts alleged in the second indictment were different.

The government argued in *Mallah* that Pacelli's double jeopardy protection was not violated by the second prosecution since there was no identity in the overt acts and no common co-conspirators and the temporal scope of the second indictment extended far beyond that as the first. The Second Circuit, however, flatly rejected the government's argument that these were the only relevant criteria by which to evaluate double jeopardy attacks on conspirators. Rather, it pointed out, the same sprawling conspiracy can be proved by a variety of different combinations of evidence. Thus, the court found that the government's reliance upon variations in the overt acts alleged to be misplaced:

> But because there are no doubt many overt acts which the government might have charged, a test measuring only overt acts provides no protection against carving one (1) large conspiracy into smaller separate agreements. *United States v. Mallah*, 503 F. 2d at 985.

Nor did the court find the lack of identity in the co-conspirators named in the two indictments to be of significance. Since both indictments alleged that the named co-defendants had conspired with "others to the Grand Jury unknown," the court concluded that the naming of defendant persons in different conspiracy indictments did not mean that there was no "overlap of personnel":

> [T]he proof below established that Pacelli was at or near the center of a large-scale, far-flung narcotics organization and therefore suggests the possibility that the others "unknown to the Grand Jury" in the [the first Pacelli case] were members of the conspiracy proved below. *Again it is quite possible that prosecutorial discretion alone explains the distinctness of the overt acts alleged.*

Id., at 983 (emphasis added).

Thus, in *Mallah*, the Second Circuit eschewed reliance upon the formalistic criteria suggested by the government. The court clearly recognized that such factors (identity of named co-conspirators, identity of overt acts alleged, and temporal and geographic constance) were matters too easily determined by the prosecutor, so that by carefully framing different indictments naming different defendants, acting in concert at different times, a single large criminal enterprise could be subdivided into several smaller ones.

The parallel to the instant case is unavoidable. In the instant case, the statutory crimes, the time frames, and the over-all enterprise are all identical. Even the geographic locations, co-defendants, co-conspirators and overt acts overlap substantially. Moreover, extensive testimony was adduced at the New York trial as to matters which are the subject of the overt acts in the Florida indictment. In addition, the crux of both the New York and Florida indictments against Cerasani is identical — membership in La Cosa Nostra and participation in activities over the identical time frame in New York and Florida. Under these circumstances, then, acquittal of the two RICO counts against him in the New York prosecution is a bar to re-prosecution for those idential charges in a different district. As noted by the Fourth Circuit in holding that conviction or acquittal of one charge of conspiracy during a particular time frame bars further prosecution of that conspiracy during that period:

> . . .This result cannot be avoided by charging the conspiracy to have been formed in another district where overt acts in furtherance of it were committed, or by charging different overt acts as having been committed in furtherance of it, or by charging additional objects or the violation of additional statutes as within its purview, if in fact the second indictment involves substantially the same conspiracy as the first. . .The constitutional provision against double jeopardy is a matter of substance and may not be thus nullified by the mere forms of criminal pleading.

Short v. United States, 91 F. 2d 614, 624 (4th Cir. 1937), *cited in, United States v. Mallah, supra,* 503 F. 2d at 985. Thus, just as the members of a gambling business cannot be successively prosecuted under the federal gambling statute for every separate state law they violate and the members of a conspiracy cannot be successively prosecuted under the federal conspiracy statutes for every separate crime they commit, so the members of an enterprise cannot be successively prosecuted under RICO for every separate "pattern" of two racketeering crimes which they commit.

Thus, just as participation in a gambling business or a conspiracy rather than commission of any individual crimes is the focal point of those respective federal crimes, so participation in the affairs of an enterprise rather than the commission of the individual racketeering crimes is the focal point of the RICO statute:

> To insure that the predicate acts possess some degree of interrelationship, some courts have used the "enterprise" element to establish a coherent crime by holding that the only relationship between the predicate crimes necessary for a Section 1962 violation is that they must relate to the same enterprises. . .Thus the "enterprise" element stands as the focal point of the offense.

United States v. Anderson, 626 F. 2d 1358 (8th Cir.), *cert. denied,* 450 U.S. 91 (1981). *See also, United States v. Weisman,* 624 F. 2d 1118, 1122 (2d Cir.), *cert. denied,* 449 U.S. 871 (1980) (it is "the enterprise itself (which) provides a significant unifying link between the various predicate acts. . .").

The lower courts in this case nevertheless held that double jeopardy bars subsequent RICO prosecutions only if all of the predicate crimes and other elements of the offense are identical, a conclusion in which they stated was based in part on the "same evidence" test of *Blockburger v. United States,* 284 U.S. 299 (1932) and in part on the five factors cited by the Fifth Circuit in *United States v. Marable,* 578 F. 2d 151, 154 (5th Cir. 1978). The *Blockburger* test is of limited value here, however. This Court has specifically held it inapplicable when, as in this case, two prosecutions are brought under a single statute. *Sanabria v. United States,* 437 U.S. 54, 70, n. 74 (1978). Moreover, it is particularly inappropriate in conspiracy cases, where satisfying it would be virtually impossible. *United States v. Mallah, supra,* 503 F. 2d at 971; *United States v. Marable, supra,* 578 F. 2d at 153.

Petitioner also submits that resort to the five factors listed in *Marable* is unnecessary in a case such as this where the statutory offenses, over-all enterprises and the time periods are all identical. These similarities alone should be sufficient to establish that the second prosecution is barred by the Double Jeopardy Clause. *See e.g. Short v. United States, supra,* 91 F. 2d at 624.

Consideration of the additional factors listed in *Marable,* however, only reinforces the conclusion that the present prosecution is unconstitutional. In *Marable,* the Fifth Circuit cited five factors as relevant to the question of whether a second conspiracy prosecution is barred by double jeopardy considerations:

> Our examination of the record focuses upon these elements: (1) time, (2) persons acting as co-conspirators, (3) the statutory offenses charged in the indictments, (4) the overt acts charged by the

> Government or any other description of the offense charged which indicates the nature and scope of the activity which the government sought to punish in each case, and (5) places where events alleged as part of the conspiracy took place. (citations omitted). Obviously, the existence of the same events as crucial parts of the proof of conspiracy in each case cuts across each of these factors and tends to show the existence of a single agreement.

Id., 578 F. 2d at 154. The lower courts apparently interpreted *Marable* as saying that identity in all five of these areas was essential to a successful double jeopardy claim. In fact, however, it is clear that the court in *Marable* was simply citing these five factors as considerations to be taken into account in determining whether the second prosecution was barred because it fell within the same "allowable unit of prosecution" as the first.

Moreover, in evaluating these factors, the lower courts failed to apply certain fundamental principles of double jeopardy analysis. First and foremost, as the Fifth Circuit made clear in *Marable*, a fundamental consideration in determining the validity of a double jeopardy claim is whether proof of the matter set out in the second indictment would have been admissible as evidence under the first indictment and, if it would have been, whether a conviction could have been properly sustained on the basis of such evidence. *Id.*, 578 F. 2d at 153; *see also, United States v. Booth,* 673 F. 2d 27, 29 (1st Cir. 1982); *United States v. Mallah, supra,* 503 F. 2d at 985; *United States v. Kramer,* 289 F. 2d 909, 913 (2d Cir. 1961).

Moreover, satisfaction of this consideration is not limited to those situations where the overt acts and/or predicate crimes alleged in the second indictment were also specifically alleged in the first indictment. As the Fifth Circuit explained in *United States v. Elliott,* 571 F. 2d at 911:

> We have long followed the rule that the government is not limited to overt acts pleaded

> in the indictment in proving a conspiracy; it may show other acts of the conspirators occurring during the life of the conspiracy. *United States v. Perez,* 489 F. 2d 59, 70 (5th Cir. 1973); *United States v. Ayres,* 434 F. 2d 60, 62 (5th Cir. 1970), *cert. denied,* 401 U.S. 938 (1971).

This Court in *Sanabria v. United States, supra,* went considerably further, holding that the government not only can but must either allege all of its "discrete theories of liability" concerning a particular charge in a single proceeding, or else be forever barred from litigating the ones it omits. *Id.,* 437 U.S. at 71-72. Put otherwise, a second prosecution is not a vehicle for the prosecution to present evidence it could have presented, but failed to muster, in the first proceeding. *Cf. Petrucelli v. Smith,* 544 F. Supp. 627 (W.D.N.Y. 1982). Consequently, the pivotal question is not whether the government actually alleged or proved the allegations in the second indictment at the first trial, but whether it could have done so.

Consideration of the five *Marable* factors with these principles in mind leads inexorably to the conclusion that the present prosecution is barred by the Double Jeopardy Clause.

A. Time

The lower courts conceded that the time period alleged in the second indictment was completely encompassed in the time period alleged in the first indictment.

B. Persons Acting as Co-conspirators

There was substantial overlap in the co-conspirators specifically named in each proceeding. Petitioner Cerasani and co-petitioner Ruggiero were each named defendants in both cases. Moreover, Santo Trafficante, Benjamin Jusick and "Jimmy" Acquifredda, all named defendants in the second indictment, were indicted co-conspirators in the first case and mentioned

prominently at that trial. Significantly, the roles of all of these individuals were identical in both cases.

The most important consideration relating to this factor, however, is that the over-all enterprise in each case was identical — La Cosa Nostra. The fact that the government chose to limit the named defendants in the first indictment to members of the Bonanno Family of La Cosa Nostra, whereas the named defendants in the second indictment included members of several other families of La Cosa Nostra as well, does not alter the fact that all of the defendants in both cases were alleged to be members of that single over-all enterprise. Moreover, both indictments alleged that the named defendants had conspired and participated in that enterprise with "others known and unknown to the Grand Jury." Consequently, the government could have included all of the named defendants in the second indictment in the first indictment if it had not decided to attempt to improperly subdivide this enterprise into "discrete units." *Sanabria v. United States, supra.*

Furthermore, even if most of the members of the enterprise had actually changed between the first indictment and the second (a factual impossibility here, since both indictments related to the same time period), that variation would not have altered the fact that each indictment related to the same enterprise. As one court explained in *United States v. Lemm,* 680 F. 2d 1193, 1199 (8th Cir. 1982), a change in the personnel of an enterprise does not undermine the over-all structure of the organization:

> The requirement of continuity of personnel is not absolute. If it were, the ring leader of an organized criminal operation could defeat RICO charges by occasionally substituting new operatives at the lower level. We have recognized that the requirement of continuity may be met even where some changes in personnel occur, and where different individuals manage the affairs of the enterprise at different times and different places.

Just as a criminal defendant cannot escape RICO charges by switching enterprise members, so, too, the government cannot subdivide one enterprise into two by a shift in personnel.

The lower courts improperly limited their consideration of "persons acting as co-conspirators" to the "named defendants" in each case. Such a restriction is contrary to the plain meaning of the words used by the court in *Marable* to describe this factor, and inconsistent with both law and logic. If the government could avoid double jeopardy simply by varying most of the named defendants, it would be free to engage in "the expedient of dividing a single crime into a series of temporal or spatial units or discrete bases of liability" which was condemned by the Supreme Court in *Sanabria v. United States, supra,* 437 U.S. at 72, and the Second Circuit in *United States v. Mallah, supra.* Indeed, in the latter case, the court found that the second conspiracy prosecution constituted double jeopardy despite the fact that Pacelli was the only named defendant common to both indictments.

Given the facts 1) that all of the defendants in both indictments in this case were alleged to be members of the same enterprise — La Cosa Nostra, 2) that all of the defendants named in each indictment could have been named as defendants or co-conspirators in the other indictment, and 3) that there was a substantial overlap in individuals actually named in both proceedings, the second *Marable* factor, like the first, weigh heavily in support of a finding of double jeopardy.

C. The Statutory Offenses Charged in the Indictments

The lower courts conceded that both indictments charged identical statutory offenses as to petitioner Cerasani.

D. The Overt Acts Charged by the Government or Any Other Description of the Offenses Charged Which Indicates the Nature and Scope of the Activity Which the Government Sought to Punish in Each Case

The jury at the first trial was presented with extensive

testimony relating to a large number of the overt acts and predicate crimes listed in the present indictment.

The important question for purposes of double jeopardy, however, is not limited to which of the overt acts and predicate crimes alleged in the second indictment were actually alleged and/or attested to at the first trial, but whether the acts and crimes alleged in the second indictment *could* have been alleged and/or attested to at the first trial, and whether, if they had been, "conviction could have been properly sustained on such evidence." *United States v. Marable, supra,* 578 F. 2d at 153. As previously explained, all of the defendants in both cases were alleged to have been associated with the same enterprise — La Cosa Nostra — and all were alleged to have participated in the conduct of the affairs of that enterprise through the pattern of racketeering offenses alleged in each indictment during the same period of time. Consequently, it is clear that all of the overt acts and predicate crimes listed in the second indictment could have been alleged and/or proven at the first trial, and that a conviction of petitioner "could have been properly sustained on such evidence." Consequently, the fourth *Marable* factor also weighs heavily in support of a finding that petitioner Cerasani is being subjected to double jeopardy in the present case.

E. Places Where Events Alleged as Part of the Conspiracy Took Place

Both of the indictments alleged that the activities of the enterprise took place throughout the United States and specifically in New York and Florida. Moreover, as is obvious from the above list of overt acts from the second indictment which were attested to in the first trial, there was substantial identity even as to specific locales within those two states. Consequently, this factor also supports a finding of double jeopardy.

The wording of the first indictment is always of particular significance to the question of double jeopardy:

> The precise manner in which an indictment is drawn cannot be ignored, because an important function of the indictment is to ensure that, "in case any other proceedings are taken against (the defendant) for a similar offense. . .the record (will) sho(w) with accuracy to what extent he may plead a former acquittal or conviction." *Cochran v. United States,* 157 U.S. 286, 290. . .(1895), quoted with approval in *Russell v. United States,* 369 U.S. 749, 764. . .(1962); *Hagner v. United States,* 285 U.S. 427. . .(1932).

Sanabria v. United States, supra, 437 U.S. at 65-66. In the first indictment in this case, the government alleged that petitioner Cerasani, other named defendants and others known and unknown were associated with a sprawling enterprise — La Cosa Nostra — and that all of these individuals conducted the affairs of that enterprise throughout the United States, including New York and Florida, over an eight year period through an alleged plethora of racketeering activity. The jury in that case, after hearing the government's evidence as to petitioner Cerasani on those charges, acquitted him.

That acquittal constitutes " 'a resolution, correct or not, of some or all of the factual elements of the offense charged' " *Sanabria v. United States,* 437 U.S. at 71, *quoting Lee v. United States,* 432 U.S. 23, 30 n. 8 (1977) *quoting United States v. Martin Linen Supply Co., supra,* 430 U.S. at 571. Consequently, petitioner Cerasani's acquittal constitutes a bar to reprosecution of him under RICO for participating in the conduct of the affairs of that enterprise during that time period even under a different theory of liability. *Sanabria v. United States, supra,* 437 U.S. at 72. As the court explained in *Short v. United States, supra:*

> . . .it must be noted that the government cannot split up one conspiracy into different indictments, and prosecute all of them, but that prosecution for any part of a single crime bars any further

> prosecution based upon the whole or a part of the same crime.

Id., at 622.

The Supreme Court explained this principle in somewhat different language in *Brown v. Ohio, supra:*

> This conclusion merely restates what has been this Court's understanding of the Double Jeopardy Clause at least since *In Re Nielson* was decided in 1899. In that case the court endorsed the rule that "where. . .a person has been tried and convicted for a crime which has various incidents included in it, he cannot be a second time tried for one of these incidents without being twice put in jeopardy for the same offense" 131 U.S. at 188. . .

Id., 431 U.S. at 168.

Consequently, the government is barred from reprosecuting an ongoing crime which engages in various illegal acts (such as a conspiracy or a RICO substantive or conspiracy offense) to the extent that it has already litigated a part or the whole of the same crime. It is also barred from litigating any part of that same crime which could have been prosecuted in the initial proceeding, even if it was not.

To hold otherwise, as the lower courts did in this case, would have the constitutionally intolerable effect of sanctioning innumerable indictments each based upon two or more predicate acts of racketeering. Since two unrelated predicate acts separated by an interval of as much as ten years can constitute a pattern [18 U.S.C. § 1961(5)], the number of potential RICO indictments against any given defendant multiplies exponentially. Indeed, affirmance of the lower court's decision would all but obliterate double jeopardy principles in RICO prosecutions. In order to assert a double jeopardy claim, the two indictments would have to be

images of each other. The government could easily defeat such a claim merely by charging two different predicate acts in each indictment regardless of the fact that they were committed by the same group of individuals in the same locales, during a continuous time period and for the same purpose.

Such a result would be an anathema to the double jeopardy protection established by the Fifth Amendment. Consequently, the charges against petitioner Cerasani in the present case must be dismissed.

CONCLUSION

For the above stated reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

MICHAEL YOUNG
Attorney for Petitioner

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

UNITED STATES of America,

Plaintiff-Appellee,

v.

Benjamin RUGGIERO and John Cerasani,

Defendants-Appellants.

No. 83-3750

United States Court of Appeals, Eleventh Circuit.

March 5, 1985.

Appeal from the United States District Court for the Middle District of Florida.

Before KRAVITCH and HENDERSON, Circuit Judges, and ATKINS,* District Judge.

KRAVITCH, Circuit Judge:

In late 1982, appellants Benjamin Ruggiero and John Cerasni were prosecuted in the United States District Court for the Southern District of New York for substantive and conspiracy violations of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1962(c) and (d). Ruggiero was convicted of conspiring to violate RICO, but was acquitted of the substantive RICO count. He was sentenced to fifteen years in prison. Cerasani was acquitted on both counts.

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* Honorable C. Clyde Atkins, U.S. District Judge for the Southern District of Florida, sitting by designation.

Appendix A

In early 1983, the indictment in the instant case was returned in the United States District Court for the Middle District of Florida, and the appellants again were charged with substantive and conspiracy RICO violations. The appellants moved to dismiss the Florida indictment on the grounds of double jeopardy. Their motion was denied, and this appeal ensued.

The appeal presents an issue of first impression in this circuit: How to define the scope of a RICO violation for double jeopardy purposes. We conclude that the substantive and conspiracy RICO violations charged in the Florida indictment are distinct from those for which the appellants previously were prosecuted in New York, and therefore hold that the appellants are not entitled to a dismissal of the Florida indictment on the grounds of double jeopardy. We also hold that the doctrine of collateral estoppel does not require the dismissal of the charges against Cerasani in the Florida indictment.

I. BACKGROUND

A. *The New York Indictment*

The New York indictment, which was returned on July 7, 1982,[1] charged the appellants and eight others with conspiring to violate RICO, and the appellants and seven others with substantive violations of RICO, in connection with the activities of the so-called "Bonnano Family" of La Cosa Nostra, also known as the Mafia.[2] The indictment alleged the occurrence of numerous illegal activities between 1974 and July, 1982, including:

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1. The indictment superseded indictments filed on November 23, 1981, and March 25, 1982.

2. The indictment also charged three individuals with possession and distribution of methaqualone, 21 U.S.C. §§ 812, 841(a)(1), and 841(b)(1)(A), and conspiring to possess and distribute methaqualone, 21 U.S.C. § 846. Neither of the appellants were charged with the methaqualone offenses.

Appendix A

(1) the murders of Alphonse Indelicato, Philip Giaccone, and Dominick Trinchera, three "captains" of the Bonnano family who were seeking to wrest control of the family away from two other "captains," Dominick Napolitano and Joseph Messina;[3]

(2) a conspiracy to murder Anthony "Bruno" Indelicato, Alphonse's son;

(3) the receipt, storage, and resale of a truckload of stolen tuna fish;

(4) the theft of a tractor trailer containing clothing and other freight;

(5) the attempted robbery of the occupants of an apartment belonging to the sister of the Shah of Iran;

(6) a conspiracy to rob the Landmark Union Trust Bank in St. Petersburg, Florida;

(7) a conspiracy to rob the Pan Am Credit Union in Rockleigh, New Jersey;

(8) a conspiracy to rob the occupants of the Galerie Des Monies in New York;

(9) the possession and distribution of methaqualone in the Eastern and Southern Districts of New York; and

(10) the operation of an illegal sports and numbers gambling business.

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3. The evidence at trial revealed that Ruggiero was a member of the "crew" captained by Napolitano. Neither Napolitano nor Messina appeared for trial, and Napolitano later was found murdered.

Appendix A

The indictment alleged that Ruggiero conspired to commit the four murders and to distribute methaqualone in the Eastern District of New York, and that he actually participated in the murders of Alphonse Indelicato, Giaccone, and Trinchera. Cerasani was named as a conspirator in the two truck thefts and all of the robberies except the robbery of the Landmark Union Trust Bank, the distribution of methaqualone in the Eastern District of New York, and the operation of the illegal gambling business, and as an actual participant in the two truck thefts, the attempted robbery of the apartment belonging to the sister of the Shah of Iran, the distribution of methaqualone in the Eastern District of New York, and the operation of the illegal gambling business.

Ruggiero was convicted of conspiring to violate RICO, but was acquitted on the substantive RICO count. He was sentenced to fifteen years in prison. His RICO conspiracy conviction was affirmed on appeal. *See United States v. Ruggiero,* 726 F.2d 913 (2d Cir. 1984), *cert. denied,* ____ U.S. ____, 105 S.Ct. 118, 83 L.Ed.2d 60 (1984). Cerasani was acquitted on both counts.

B. *The Florida Indictment*

The Florida indictment, which was returned on March 31, 1983, charged the appellants and ten others with conspiring to violate RICO, and the appellants and nine others with substantive violations of RICO, in connection with the activities of a loose-knit enterprise composed of members of several La Cosa Nostra "families." The enterprise included members of the "Trafficante Family," the "Luchese Family," the "Gambino Family," the "Chicago Outfit," and the "Bonnano Family."[4] The indictment

4. The indictment alleged that Santo Trafficante, Jr., the head of the "Trafficante Family," agreed to permit the members of the other families to engage in criminal activities on the west coast of Florida in return for a percentage of the profits derived from those activities.

alleged the occurrence of numerous illegal activities between March, 1979, and November, 1981, including:

(1) the operation of an illegal gambling business at an apartment in Port Richey, Florida;

(2) the operation of an illegal gambling business at the Kings Court Club in Holiday, Florida;

(3) a conspiracy to operate an illegal gambling business at the Ridgerunner Club in Port Richey, Florida;

(4) a conspiracy to maintain an illegal gambling facility in the Middle District of Florida;

(5) the operation of an illegal sports bookmaking business;

(6) travelling in interstate commerce to facilitate the operation of an illegal gambling business;

(7) the extortion of money from one Sylvester Hutchins;

(8) a conspiracy to interfere with commerce by extorting money from persons and organizations engaged in the private sanitation industry on the west coast of Florida;

(9) a conspiracy to collect debts by violent means and by threats of violence;

(10) a conspiracy to obtain through bribery a license to operate a parimutuel dog track in Pasco County, Florida;

(11) a conspiracy to rob the Landmark Union Trust Bank in St. Petersburg, Florida;

(12) a conspiracy to possess, sell, and distribute marihuana, cocaine, and heroin;

(13) a conspiracy to obstruct justice by paying bribes to the captain of the Pasco County, Florida, Sheriff's Office; and

(14) the obstruction of justice by giving false testimony before a federal grand jury.

The indictment alleged that Ruggiero conspired to operate the illegal gambling business at the Kings Court Club, to operate the illegal sports bookmaking business, to maintain the illegal gambling facility in the Middle District of Florida, to travel in interstate commerce to facilitate the operation of an illegal gambling business, to obtain through bribery the license to operate the parimutuel dog track in Pasco County, to rob the Landmark Union Trust Bank, and to possess, sell, and distribute marihuana, cocaine, and heroin, and that he actually travelled in interstate commerce to facilitate an illegal gambling business and participated in the operation of the illegal gambling business at the Kings Court Club. Cerasani allegedly conspired to rob the Landmark Union Trust Bank and to possess, sell, and distribute marihuana, cocaine, and heroin.

C. *The Proceedings Below*

On July 15, 1983, the appellants filed a motion to dismiss the Florida indictment on the grounds of double jeopardy. The district court conducted a hearing and, on December 6, 1983, denied the motion. The appellants then filed a notice of appeal. On December 15, 1983, the court ruled that the appellants' double jeopardy claim was non-frivolous and, in accordance with *United States v. Dunbar,* 611 F.2d 985, 988 (5th Cir.) (*en banc*), *cert. denied,* 447 U.S. 926, 100 S.Ct. 3022, 65 L.Ed.2d 1120 (1980),[5]

5. The Eleventh Circuit, in the *en banc* decision *Bonner v. City of Prichard,* 661 F.2d 1206, 1209 (11th Cir.1981), adopted as precedent decisions of the former Fifth Circuit rendered prior to October 1, 1981.

continued the trial date until the merits of the claim could be resolved by this court on appeal.

II. RICO AND DOUBLE JEOPARDY

The Double Jeopardy Clause of the Fifth Amendment provides: "[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb. . . ." U.S. Const. amend. V. The Supreme Court has emphasized that the Double Jeopardy Clause protects a person not only against being twice *convicted* of the same offense, but also against being twice *put to trial* for the same offense. *See Abney v. United States,* 431 U.S. 651, 660-61, 97 S.Ct. 2034, 2041, 52 L.Ed.2d 651 (1977). Therefore, we must dismiss the Florida indictment if we find that the indictment charges the appellants with the same offenses for which they previously were prosecuted in New York.[6]

Our task is made more difficult by the peculiar nature of the RICO statute. The subsection of RICO that the appellants are charged with violating and conspiring to violate,[7] 18 U.S.C. § 1962(c), provides:

> (c) It shall be unlawful for any person employed by or associated with any enterprise engaged in,

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6. In *Abney,* the Supreme Court held that "pre-trial orders rejecting claims of former jeopardy . . . constitute 'final decisions' and thus satisfy the jurisdictional prerequisites of § 1291." 431 U.S. at 662, 97 S.Ct. at 2042. Thus, we have jurisdiction to hear this appeal although the appellants have not yet been placed on trial under the Florida indictment.

7. The charge of conspiring to violate RICO arises under 18 U.S.C. § 1962(d), which provides:

> (d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section.

> or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

Unlike most criminal statutes, subsection 1962(c) deals not with clearly distinguishable discrete acts, but with ongoing criminal activity. At the same time, subsection 1962(c) differs from most other criminal statutes dealing with ongoing criminal activity. Such statutes generally prohibit *participation* in a particular kind of criminal venture. *See, e.g.,* 18 U.S.C. § 1955 ("Whoever conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business shall be fined not more than $20,000 or imprisoned not more than five years, or both."); 21 U.S.C. § 848 ("Any person who engages in a continuing criminal enterprise shall be sentenced to a term of imprisonment which may not be less than 10 years and which may be up to life imprisonment. . . ."). Thus, under such statutes, a potential double jeopardy problem arises whenever a defendant is charged twice with participating in the same criminal venture during the same period of time. *See Sanabria v. United States,* 437 U.S. 54, 69-74, 98 S.Ct. 2170, 2181-84, 57 L.Ed.2d 43 (1978) (defendant may be prosecuted only once under 18 U.S.C. § 1955 for participating in an illegal gambling business during given period of time, even if the illegal gambling business violated more than one criminal statute.).

Subsection 1962(c), on the other hand, prohibits participation in an enterprise "*through a pattern of racketeering activity.*" The "pattern of racketeering activity" is a separate element of the RICO offense, distinct from both the existence of the enterprise and the participation of the individual in the enterprise. *See United States v. Phillips,* 664 F.2d 971, 1011 (5th Cir. Unit B 1981), *cert.*

denied, 457 U.S. 1136, 102 S.Ct. 2965, 73 L.Ed.2d 1354 (1982).[8] Because of this separate element, an individual may be prosecuted for more than one violation of subsection 1962(c) in connection with the same enterprise, so long as each violation involved a different "pattern of racketeering activity." *See United States v. Russotti,* 717 F.2d 27, 33 (2d Cir.1983), *cert. denied,* ____ U.S. ____, 104 S.Ct. 1273, 79 L.Ed.2d 678 (1984); *United States v. Dean,* 647 F.2d 779, 787 (8th Cir.), *modified on other grounds,* 667 F.2d 729 (1982), *cert. denied,* 456 U.S. 1006, 102 S.Ct. 2296, 73 L.Ed.2d 1300 (1982).

The crucial inquiry in this case, therefore, is whether the activities set out in the New York and Florida indictments constitute one "pattern of racketeering activity" or two different "pattern[s]."[9] Although we have not conducted this kind of inquiry before, we do not write on an entirely clean slate. Both the Eighth Circuit, in *Dean,* and the Second Circuit, in *Russotti,* addressed double jeopardy claims raised by defendants who had been charged with multiple RICO violations.[10] The *Dean* and

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8. Decisions of the former Fifth Circuit, Unit B, rendered after September 30, 1981, are binding precedent in this circuit. *Stein v. Reynolds Securities, Inc.,* 667 F.2d 33, 34 (11th Cir.1982).

9. Although each indictment contained both a substantive RICO charge and a conspiracy RICO charge, we need not compare the substantive and conspiracy charges separately. It is apparent that, in each indictment, both the substantive and conspiracy RICO charges were based on the same underlying "pattern of racketeering activity." Therefore, we may compare the indictments as a whole in order to determine whether the underlying "pattern[s] of racketeering activity" were the same or different.

10. In *Dean,* the defendant, an Arkansas county judge, was charged in two indictments with two substantive RICO violations, 18 U.S.C. § 1962(c), and thirty-six violations of the Travel Act, 18 U.S.C. § 1952. The first RICO violation involved actual and fictitious county purchases of corrugated metal culverts and other items from a supplier who paid kickbacks to the defendant.

(Cont'd)

Appendix A

Russotti courts considered the following five factors in determining whether the indictments charged the existence of one "pattern of racketeering activity"or two different "pattern[s]":

> (1) whether the activities that allegedly constituted two different RICO "pattern[s]" occurred during the same time periods;
>
> (2) whether the activities occurred in the same places;
>
> (3) whether the activities involved the same persons;
>
> (4) whether the two indictments alleged violations of the same criminal statutes; and

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(Cont'd)

The second RICO violation involved county purchases of diesel fuel additives, gasoline additives, motor oil, and other automotive products from a different supplier who also paid kickbacks to the defendant. The defendant was tried and convicted on all counts.

On appeal, the Eighth Circuit reversed and remanded the case for a new trial because one of the jurors was biased against the defendant. *Dean,* 647 F.2d at 785. The court also, however, rejected the defendant's contention that his conviction on both RICO counts violated the Double Jeopardy Clause. *Id.* at 785-89. On rehearing, the *en banc* court held that the defendant had waived the issue of juror bias, and affirmed the convictions. *Dean,* 667 F.2d at 734.

In *Russotti,* four defendants were indicted for substantive and conspiracy RICO offenses, 18 U.S.C. §§ 1962(c) and (d). Two of the defendants had been tried and acquitted of substantive and conspiracy RICO charges some five years earlier. The two defendants filed motions to dismiss the indictment based on, *inter alia,* the Double Jeopardy Clause and the doctrine of collateral estoppel. The district court denied the motions to dismiss, and the Second Circuit affirmed. *Russotti,* 717 F.2d at 35.

> (5) whether the overall nature and scope of the activities set out in the two indictments were the same.

See Russotti, 717 F.2d at 33; *Dean,* 647 F.2d at 788. These five factors are modified versions of the factors long used to determine whether multiple indictments charge the existence of one or several conspiracies. *See United States v. Marable,* 578 F.2d 151, 154 (5th Cir.1978); *Arnold v. United States,* 336 F.2d 347, 350 (9th Cir. 1964), *cert. denied,* 380 U.S. 982, 85 S.Ct. 1348, 14 L.Ed.2d 275 (1965); *Short v. United States,* 91 F.2d 614, 619-20 (4th Cir. 1937).[11]

We are persuaded that these five factors constitute an appropriate method for determining whether multiple RICO indictments allege the existence of one "pattern of racketeering activity" or several "pattern[s]." In this regard, we agree with the following observations of the *Dean* court:

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11. The five factors, as applied to multiple conspiracy indictments, include:

> (1) the time periods during which the events alleged to be part of the conspiracies occurred;
>
> (2) the places where the events occurred;
>
> (3) the persons acting as coconspirators;
>
> (4) the statutory offenses charged in the indictments; and
>
> (5) the overt acts or any other description of the offense chargd that indicates the nature and scope of the activity that the government sought to punish in each case.

See Marable, 578 F.2d at 154.

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> A RICO charge focuses upon the "pattern" formed by a number of unlawful acts, while a conspiracy charge focusses upon the agreement formed by persons to do unlawful acts. Thus, a RICO charge, like a conspiracy charge, focusses upon a relation between various elements of criminal activity rather than a single criminal act. Determination in a given case of the number of patterns or agreements requires examination of the four corners of the charges. The cases have employed five factors to make this determination in conspiracy cases, and similar factors appear to us relevant in the RICO context. . . .

647 F.2d at 788; *see* Tarlow, *RICO: The New Darling of the Prosecutor's Nursery,* 49 Fordham L.Rev. 165, 257-259 (1980) ("The practical approach to multiple conspiracy indictments should affect cases involving separate section 1962(c) indictments.").[12] We also agree with the *Russotti* court that the

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12. Although subsection 1962(c) is not a conspiracy statute, we find it to be sufficiently similar to allow the use of the same five factors for double jeopardy analysis. In particular, although the search for one or more conspiratorial "agreements" may differ in some respects from the search for one or more RICO "pattern[s]," this court's predecessor has discussed the multiple conspiracy issue in terms perfectly applicable to RICO:

> The evidence discloses that the unlawful agreement pursuant to which the conspirators acted was but a single agreement to deal in drugs. It cannot be separated into dual conspiracies under Section 846 to distribute cocaine and heroin without offending the Double Jeopardy Clause. When the events of the alleged heroin conspiracy are overlaid with those of the cocaine conspiracy, there emerges *not two discrete patterns of activity but a single design* with the events most important in each case appearing at crucial and common junctures.

Marable, 578 F.2d at 155-56 (emphasis added).

fifth factor, which involves a comparison of the overall nature and scope of the activities set out in the two indictments, is the most important factor. *See Russotti,* 717 F.2d at 34. We therefore proceed to apply the five factors to the indictments involved in this case.

Applying the first factor, we find a significant overlap in the timer periods covered by the two indictments. The New York indictment included activities that occurred between 1974 and July, 1982, and the Florida indictment included activities that occurred between March, 1979, and November, 1981. Thus, the time period covered by the Florida indictment fits completely within the time period covered by the New York indictment.

The second and third factors, however, involve only minor overlaps. The activities set out in the two indictments generally occurred in different places. The activities in the New York indictment primarily occurred in New York and New Jersey, and the activities in the Florida indictment primarily occurred in Florida. The only geographic overlap is created by the reference in both indictments to the conspiracy to rob the Landmark Union Trust Bank in St. Petersburg, Florida. The activities set out in the two indictments also generally involved different persons. In fact, the only persons named in both indictments are the appellants.

The fourth factor also involves only a minor overlap in the two indictments. The New York indictment involved the underlying statutory crimes of murder (New York law), theft (18 U.S.C. §§ 2315 and 659), robbery (New York, New Jersey, and Florida law), possession and distribution of methaqualone (21 U.S.C. §§ 812, 841(a)(1), and 841(b)(1)(A)), and gambling (New York law and 18 U.S.C. § 1955). The Florida indictment involved the underlying statutory crimes of gambling (Florida law and 18 U.S.C. § 1955), bribery (Florida law), obstruction of law enforcement (18 U.S.C. § 1511), interference with commerce (18 U.S.C. § 1951), interstate travel in aid of a racketeering enterprise

(18 U.S.C. § 1952), extortion (18 U.S.C. § 894), obstruction of justice (18 U.S.C. § 1503), robbery (Florida law), and possession and distribution of controlled substances (21 U.S.C. §§ 841(a)(1) and 846). Thus, the two indictments overlap only in their references to the federal drug statutes, 21 U.S.C. §§ 841 and 846, the federal gambling statute, 18 U.S.C. § 1955, and the Florida robbery statute.

Finally, we find no overlap in the fifth and most important factor. The New York indictment, viewed in its totality, involved the efforts of the "Bonnano Family" to establish and maintains a criminal empire in the New York/New Jersey area. The Florida indictment, on the other hand, involved a "joint venture" by members of several La Cosa Nostra families to conduct various criminal activities on the west coast of Florida. We find this distinction in the overall nature and scope of the activities set out in the indictments more than sufficient, in this case, to outweigh the overlaps in connection with the other factors.

On balance, then, we conclude that the New York and Florida indictments charged the existence of two different "pattern[s] of racketeering activity." In view of this conclusion, the presence of one particular "racketeering act" in both indictments, namely, the conspiracy to rob the Landmark Union Trust Bank in St. Petersburg, Florida, is not significant. We see no reason why one "racketeering act" may not be a part of two different "pattern[s] of racketeering activity."[13] The Double Jeopardy Clause protects a person against successive prosecutions *for the same crime,* not

13. By way of comparison, we note that one "overt act" can be in furtherance of two different conspiracies. For example, *A* might purchase a gun for the dual purposes of (1) committing a bank robbery pursuant to a conspiracy with *B* and *C*, and (2) committing a murder pursuant to a different conspiracy with *X* and *Y*. The presence of the same overt act, the purchase of the gun, in separate indictments for the two conspiracies certainly would not create a double jeopardy problem.

against successive prosecutions for two *different* crimes that happen to include the same underlying act.[14]

Like the *Dean* and *Russotti* courts, we are mindful of the Supreme Court's admonition that "[t]he Double Jeopardy Clause is not such a fragile guarantee that prosecutors can avoid its limitations by the simple expedient of dividing a single crime into a series of temporal and spatial units." *Brown v. Ohio,* 432 U.S. 161, 169, 97 S.Ct. 2221, 2227, 53 L.Ed.2d 187 (1977). We also recognize that the RICO statute is susceptible to abuse in the hands of over-zealous prosecutors. *See Russotti,* 717 F.2d at 34 & n. 4; Tarlow, *RICO: The New Darling of the Prosecutor's Nursery,* 49 Fordham L.Rev. 165, 259 n. 505 (1980). Nevertheless, we perceive no such abuse in this case. Here, the appellants engaged in two fundamentally different "pattern[s]" of criminal conduct. Hence, the Florida indictment did not charge the appellants with the same offenses for which they previously were prosecuted in New York, and the appellants' motion to dismiss properly was denied.[15]

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14. For similar reasons, we reject the appellants' contention that the Double Jeopardy Clause was offended by the introduction, at the New York trial, of evidence relating to some of the activities later set out in the Florida indictment. This contention would have merit only if the evidence at the New York trial revealed that the "pattern of racketeering activity" was broader in scope than alleged in the indictment. Upon reviewing the excerpts from the New York trial contained in the record on appeal in this case, we conclude that the challenged evidence primarily was offered to explain how the government's witnesses, who had infiltrated the criminal enterprise in Florida, had obtained their information. We find no indication, either in the trial excerpts or in the Second Circuit's opinion on appeal, that the "pattern of racketeering activity" was broadened at trial to include the activities set out in the Florida indictment. In fact, the one "racketeering act" contained in both indictments, the conspiracy to rob Landmark Union Trust Bank in St. Petersburg, Florida, was not even submitted to the jury at the New York trial.

15. The government also contends that the New York and Florida indictments involved two different RICO "enterprises." According to the government, the New York indictment involved a group of persons affiliated

(Cont'd)

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III. COLLATERAL ESTOPPEL

Appellant Cerasani also contends that the doctrine of collateral estoppel requires the dismissal of the charges against him in the Florida indictment. It is true that, in criminal cases, the doctrine of collateral estoppel is a corollary of the Double Jeopardy Clause. *See Ashe v. Swenson,* 397 U.S. 436, 445-46, 90 S.Ct. 1189, 1195, 25 L.Ed.2d 469 (1970). The doctrine, however, requires the dismissal of charges against an individual only if, in order to prove those charges, the government must relitigate an issue of ultimate fact that *necessarily* was resolved in favor of the individual in a previous trial. *See Russotti,* 717 F.2d at 35. The crucial issue is "whether a rational jury could have grounded its verdict upon an issue other than that which the

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with the "Bonnano Family," and the Florida indictment involved a basically different group of persons affiliated with several La Cosa Nostra families.

It is true that Congress gave the term "enterprise" under the RICO statute an extremely broad definition, *see United States v. Thevis,* 665 F.2d 616, 625 (5th Cir.), *cert. denied,* 456 U.S. 1008, 102 S.Ct. 2300, 73 L.Ed.2d 1303 (1982), and that "any union or group of individuals associated in fact," whether legitimate or illegitimate, can constitute a RICO "enterprise", *see United States v. Turkette,* 452 U.S. 576, 580-81, 101 S. Ct. 2524, 2527, 69 L.Ed.2d 246 (1981). Furthermore, multiple RICO indictments involving truly different "enterprises" pose no double jeopardy problem, even assuming that the indictments allege only one "pattern of racketeering activity." *See Russotti,* 717 F.2d at 33 ("[I]n order for the present indictment to give rise to a valid claim of double jeopardy, *both* the enterprise and the pattern of activity alleged in the [previous] indictment must be the same as those alleged in the [present] indictment." (emphasis in original)). The problem is in determining whether two RICO "enterprises" are truly different for double jeopardy purposes. *See* Tarlow, *RICO: The New Darling of the Prosecutor's Nursery,* 49 Fordham L. Rev. 165, 258-59 & n. 505 (1980). Eventually, courts may find it necessary to devise a method, perhaps similar to the one we employ today to compare RICO "pattern[s]," for determining whether two RICO "enterprises" are the same or different. We need not address the issue here, however. Because we find that the New York and Florida indictments charged the existence of two different "pattern[s] of racketeering activity," it is immaterial whether the indictments also alleged the existence of two different RICO "enterprises."

defendant seeks to foreclose from consideration." *Ashe,* 397 U.S. at 444, 90 S.Ct. at 1194; *see Russotti,* 717 F.2d at 35.

The doctrine does not apply to the instant case because there is no issue of ultimate fact raised by the Florida indictment that *necessarily* was resolved in favor of Cerasani in the New York trial. Cerasani's previous acquittal could have been based on the jury's conclusion that, although Cerasani was an active member of the "Bonnano Family," he did not participate in the particular "pattern of racketeering activity" set out in the New York indictment. The Florida indictment, on the other hand, charges the existence of a different "pattern of racketeering activity." Thus, in the words of the *Russotti* court, "at this stage of the proceedings, we fail to see any indication of an attempt by the government 'to persuade a second jury of the same fact already litigated' in defendants' favor. 717 F.2d at 35 (quoting *United States v. Mespoulede,* 597 F.2d 329, 335 (2d Cir.1979)); *see also United States v. Boffa,* 513 F.Supp. 444, 483 (D.Del.1980) ("*A fortiori* the jury could have reached its decision to acquit without resolving any of the present issues in favor of the defendant. Consequently, the doctrine of collateral estoppel does not require dismissal of any portion of the present Indictment."). We hold that Cerasani is not entitled to a dismissal of the charges against him in the Florida indictment under the doctrine of collateral estoppel.

IV. CONCLUSION

For the foregoing reasons, the order of the district court denying the appellants' motion to dismiss the indictment is AFFIRMED.

APPENDIX B -- ORDER OF THE UNITED STATES DISTRICT COURT, MIDDLE DISTRICT OF FLORIDA

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

Case No. 83-27-Cr-T-15

UNITED STATES OF AMERICA

vs.

SANTO TRAFFICANTE, JR., et al.,

Defendants Cerasani and Ruggiero seek dismissal on the same ground — that this case is barred by the Double Jeopardy Clause of the United States Constitution due to an earlier New York prosecution. Because these Motions are nearly identical, the Court will consider them together.

Defendants Ruggiero and Cerasani were defendants in the New York case of *United States v. Napolitano,* SS 81 CR. 803 (RWS) (S.D.N.Y. 1982). Defendant Ruggiero was convicted of one count, and Defendant Cerasani was acquitted of both counts, of the New York indictment, which alleged both a substantive RICO Count and a conspiracy RICO Count. The present indictment also contains two RICO Counts, one a conspiracy and one substantive.

Blockburger v. United States, 284 U.S. 299, 304 (1932) is uniformly cited as providing the test of whether the two offenses charged are in fact the same for double jeopardy purposes: "[w]hether each provision requires proof of an additional fact which the other does not." The Fifth Circuit has developed a formulation that helps courts apply the *Blockburger* "same evidence" test in conspiracy cases. Courts should compare the alleged conspiracies in relation to the overlap of: 1. Time

fram; 2. Co-conspirators; 3. Statutory offenses; 4. Overt acts charged and activities alleged indicating the scope of offenses charged; and 5. Location. *See e.g. United States v. Marable,* 578 F.2d 151, 154 (5th Cir. 1978). While acknowledging the authority of *Marable,* the Defendants contend that "the existence of the same events as crucial parts of the proof of conspiracy in each case cut across each of these factors and tends to show the existence of a single agreement," *id.* at 154, which would bar the instant prosecution. In *United States v. Russotti,* 717 F.2d 27 (2d Cir. 1983), the Court squarely addressed the question before this Court — whether to dismiss a RICO indictment prior to trial based upon double jeopardy allegedly arising from an earlier RICO prosecution.

The *Russotti* Court started its inquiry by observing that violations of double jeopardy necessarily depend upon the " 'allowable unit of prosecution.' " *Id.* at 32, *citing Sanabria v. United States,* 437 U.S. 54, 69-70 (1977). The Court noted that to state a RICO violation, there must be present both an "enterprise" and a "pattern of racketeering activity." It is the combination of these two factors that RICO criminalizes. The *Russotti* Court therefore reasoned: "[I]n order for the present indictment to give rise to a valid claim of double jeopardy, *both* the enterprise and the pattern of activity alleged in the 1976 indictment must be the same as those alleged in the 1982 indictment. If either is different, there is no infirmity under the double jeopardy clause." *Id.* at 11. The *Russotti* Court then undertook that inquiry by examining the five factors previously noted.

Examination of the five factors explored by the *Russotti* Court applied to this case shows:

A. TIME

The time periods during which each alleged conspiracy took place overlap in their entirety in these cases. The New York

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indictment alleges a conspiracy to engage in racketeering continuing from 1974 until the date of the indictment, March, 1982. The present indictment alleges a conspiracy to engage in a pattern of racketeering activity from March, 1979 through November, 1981.

B. (illegible)

The named defendants in the two cases are listed below:

New York Indictment:	Florida Indictment:
1. *John Cerasani*	1. *John Cerasani*
2. *Benjamin Ruggiero*	2. *Benjamin Ruggiero*
3. Dominic Napolitano	3. Santo Trafficante, Jr.
4. Joseph Messina	4. Benjamin Husick
5. Antonio Rabito	5. Frank Foggia
6. Nicholas Santora	6. Vincenzo Aquafredda
7. James Episcola	7. Vincent Ciraulo
8. Antonio Tomasulo	8. Bernard Agostino
9. Dennis Mulligan	9. Joseph Fitapelli
10. Vincent Pitco	10. John M. Cascio
	11. Joseph Donahue

of twenty-one Defendants these two Defendants are the only ones appearing in each indictment.

Appendix B

C. STATUTORY OFFENSES CHARGED IN EACH INDICTMENT

Both indictments contain two Count RICO allegations — a substantive count under 18 U.S.C. § 1962(c) and a conspiracy count under 18 U.S.C. § 1962(d). The provisions make it "unlawful for any person . . . associated with any enterprise engaged in . . . interstate or foreign commerce, to conduct . . . such enterprise's affairs through a pattern of racketeering activity . . . ," § 1962(c), and to conspire to do such,§ 1962(d). In the Florida indictment, the eleven Defendants allegedly belonged to various "mafia" families of LaCosa Nostra, while the ten New York Defendants allegedly belonged to only the Bonnano family.

D. LOCATION

The New York indictment alleged that the conspiracy took place in New York and "elsewhere." The Florida indictment speaks in terms of acts done in Florida, charging that the Defendants travelled in interstate commerce to aid racketeering.

E. OVERT ACTS CHARGED AND ACTIVITIES ALLEGED INDICATING SCOPE OF OFFENSES AS CHARGED

The *Russotti* Court recognized this area as the "most significant" of the five factors to be considered in addressing the similarity of the cases at hand. 717 F.2d at 34. Counts I of both indictments are conspiracies to engage in a racketeering enterprise. The New York conspiracy involves thirteen specific activities, including conspiracy to murder, truck thefts, robberies, drug distribution schemes, and gambling violations. The New York substantive Count involves eight activities, all of which were named in the conspiracy Count. The Florida conspiracy Count alleges twenty-two specific illegal activities, including gambling, obstruction of justice, Travel Act violations, extortion, bribery

and bank robbery conspiracy. Only the latter overlaps with the New York indictments. The substantive Count alleges seventeen activities, all encompassed within the conspiracy Count, with bank robbery alone overlapping the New York indictment.

As to Defendant Cerasani, only two predicate acts are charged in the Florida indictment — one is the conspiracy to rob the Landmark Union Trust Bank of St. Petersburg and the other is trafficking in marijuana, heroin and cocaine. The bank robbery conspiracy, as previously noted, was charged in the New York indictment, but it named as the conspirators Dennis Mulligan, James Episcopia and "others known and unknown to the Grand Jury."

F. THE EVIDENCE ADDUCED AT THE FIRST TRIAL

At oral argument, the Government argued that the Court's examination of a double jeopardy question is limited to a "facial examination of the charging instruments" and that an examination of the evidence adduced at the New York trial would be a "red herring."

In support of this argument, the Government cited *Russotti,* where the court appeared to so limit its examination. The *Russotti* Court, however, found no similarity between the indictments and concluded that on the face of the indictments distinct patterns of racketeering were alleged. In that case, a 1976 indictment charged the Defendants with a RICO conspiracy to commit arson for hire and other crimes. In 1982, a second indictment charged the Defendants with a RICO conspiracy to commit extortion and other crimes. As one of the predicate acts for the conspiracy, the second indictment asserted various acts done in relation to the 1973 murder of an individual named Massaro. The Defendants contended that the prosecution "held in reserve" the circumstances of that homicide, which should have been charged under the first indictment or not at all. The *Russotti* Court disagreed, indicating

that the homicide clearly related to the extortion scheme. The present case involves not only the question of whether certain predicate acts have been held in reserve but whether certain of the predicate acts in the second indictment were charged and actually presented at the first trial. Consequently, the Court undertook to examine excerpts of the evidence adduced at the first trial in addition to examining the indictments on their face. The Court has carefully examined what Defendants have submitted as the relevant excerpts from that transcript.

In regards to the bank robbery allegations, the New York Indictment named Dennis Mulligan, James Episcopia and "others." The Florida Indictment makes the same allegations as to Defendants Cerasani, Ruggiero and "others." However, the Court has been directed to no New York trial testimony which in any way refers to Defendants Cerasani and Ruggiero as being involved in or otherwise connected with any bank robbery scheme, nor is there any basis on which the jury could have considered these Defendants as having been no involved or not involved in such scheme.

As to the Florida drug trafficking charges, which deal with marijuana, heroin and cocaine, the Court was referred to no testimony introduced at the New York trial, that either Cerasani or Ruggiero were trafficking in these controlled substances. There was one reference to heroin made, however, that appeared to be an inadvertent remark not pertinent to the New York case. In short, the Florida indictment does not seek to punish Cerasani or Ruggiero for any of the same offenses or patterns of racketeering offenses for which they were tried in the New York prosecution. The Court also considers whether the "enterprises" charged in the two indictments are the same. *Russotti,* 717 F.2d at 33. The Government argues that this Florida indictment charges a different enterprise from the New York indictment in that the New York indictment involved only the "Bonnano family" of LaCosa Nostra, while the Florida enterprise was LaCosa Nostra

in aggregate and the "Bonnano family" was simply a separate and smaller portion of that total. The allegations of the respective indictments support this construction. The same persons may join together to comprise different enterprises, *Russotti,* 717 F.2d at 34 and one act may simultaneously further both enterprises. Here there were two enterprises with these Defendants members of both. For the reasons above set forth, the Court finds no double jeopardy as to these Defendants and it is therefore,

ORDERED:

1. The motions to dismiss of Defendants Cerasani and Ruggiero on double jeopardy grounds are DENIED.

DONE AND ORDERED at Tampa, Florida this 5th day of December, 1983.

s/ William J. Castagna
WILLIAM J. CASTAGNA
United States District Judge

Copies to: Counsel of Record

APPENDIX C — JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 83-3750

D.C. Docket No. 83-27

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

BENJAMIN RUGGIERO and JOHN CERASANI,

Defendants-Appellants.

Appeal from the United States District Court for the Middle District of Florida

Before KRAVITCH and HENDERSON, Circuit Judges, and ATKINS*, District Judge.

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the order of the District Court appealed from, in this cause be and the same is hereby, AFFIRMED.

Appendix C

Entered: March 5, 1985
For the Court: Spencer D. Mercer,
Clerk

By: Warren A. Godfrey
Deputy Clerk

ISSUED AS MANDATE: Mar. 27, 1985

APPENDIX D — RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

Amendment V of the United States Constitution provides:

> . . . nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb. . . .

18 U.S.C. § 1962(c) provides:

> It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.